



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER PO-2123

Appeal PA-020290-1

Management Board Secretariat



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NATURE OF THE APPEAL:

Management Board Secretariat (MBS) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) "...for access to any personal information, in a personal information bank or elsewhere, relating to my recent attempt to gain employment with the Ontario government's internship program". The requester also requested that he be given "...the opportunity to correct any inaccurate information".

MBS advised the requester that the responsive records fall outside the scope of the *Act* because they relate to labour relations and/or employment-related matters, as defined in section 65(6)3.

The requester, now the appellant, appealed this decision.

Mediation was unsuccessful and the appeal was transferred to the adjudication stage. I sent a Notice of Inquiry to MBS initially, setting out the facts and issues in the appeal and seeking representations. MBS submitted representations, which I shared with the appellant, along with a copy of the Notice. The appellant also provided representations.

RECORDS:

The records all relate to the appellant's application for a position within the Ontario Public Service internship program, and the subsequent recruitment process. Specifically, the records consist of:

1. Candidate Ranking by Score
2. Interview Questions
3. Appellant's answers to interview questions with scores – Interviewer 1
4. Appellant's answers to interview questions with scores – Interviewer 2
5. Memo written by appellant – test
6. Reference check consent form and letter of reference
7. Post interview feedback tracking sheet
8. Appellant's screening results
9. General Information provided by appellant

DISCUSSION:

The sole issue to be addressed by this order is whether the records are excluded from the *Act* by application of section 65(6)3, which reads as follows:

Subject to subsection (7), this *Act* does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

In order to fall within the scope of paragraph 3 of section 65(6), MBS must establish that:

1. the records were collected, prepared, maintained or used by the institution or on its behalf; **and**
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; **and**
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

Section 65(6)3 is record-specific and fact-specific. If section 65(6)3 applies to the records, and none of the exceptions found in section 65(7) apply, section 65(6)3 has the effect of excluding records from the scope of the *Act*. The appellant has no right of access to records which are outside the ambit of the *Act* pursuant to section 65(6)3.

Section 65(7) has no application in the circumstances of this appeal.

Requirements 1 and 2

MBS submits that all of the records were either collected, prepared or used by MBS in the recruitment process for the internship program. MBS states: “Although some [records] were prepared by the appellant, all nine were collected and used by MBS. Therefore, the first part of section 65(6)3 has been met”. I concur.

MBS also submits that the records were collected, prepared or used in relation to “meetings, consultations or communications in the context of the job recruitment process”. Specifically, MBS points to past orders which establish that an employment-related interview is a “meeting”; that deliberations about the results of a job competition among interview panel members are “meetings, discussions and communications” (Orders M-1105 and MO-1270); and that records produced in the context of a job competition are “communications” for the purposes of section 65(6)3 (Orders M-86, P-1258, PO-1667, PO-2035). Again, I concur with this position.

Accordingly, I find that the first and second requirements of section 65(6)3 have been established.

Requirement 3

As far as the third requirement is concerned, previous orders have found that job competitions are labour relations or employment-related matters in which an institution has an interest (e.g. Orders M-830 and PO-1950). In support of its position on the third requirement, MBS identifies Order MO-1193, where Adjudicator Holly Big Canoe found that the job competition process is inherently an “employment-related matter” for the purposes of the municipal equivalent to section 65(6)3.

Past orders have also established that the complete hiring process is considered to be the employment-related matter, and that records concerning recruitment, screening and interviewing satisfy the requirements of the term “employment-related matter”, regardless of the fact that a requester may not ultimately be the successful candidate (Orders P-1627, P-1685-F, PO-1760, MO1291).

Applying the reasoning from these past orders, I find that the records at issue in this appeal were collected, prepared or used by MBS in relations to meetings, discussions, communications or consultations about an employment-related matter, specifically the appellant’s application for a position with the internship program. As MBS points out, the fact that the appellant was not a successful candidate is irrelevant in this regard.

The only remaining issue is whether MBS “has an interest” in this employment-related matter.

A number of previous orders have addressed the issue of whether or not an institution “has an interest” in a matter for the purposes of section 65(6)3 of the *Act*. In *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355, leave to appeal refused [2001] S.C.C.A. No. 509), the Ontario Court of Appeal specifically addressed the meaning of the phrase “in which the institution has an interest” as follows:

As already noted, section 65 of the *Act* contains a miscellaneous list of records to which the *Act* does not apply. Subsection 6 deals exclusively with labour relations and employment related matters. Subsection 7 provides certain exceptions to the exclusions set out in subsection 6. Examined in the general context of subsection 6, the words “in which the institution has an interest” appear on their face to relate simply to matters involving the institution’s own workforce. Sub clause 1 deals with records relating to “proceedings or anticipated proceedings relating to labour relations or to the employment of a person **by the institution**” [emphasis added]. Sub clause 2 deals with records relating to “negotiations or anticipated negotiations relating to labour relations or to the employment of a person **by the institution**” [emphasis added]. Sub clause 3 deals with records relating to a miscellaneous category of events “about labour-relations or employment related matters in which the institution has an interest”. Having regard to the purpose for which the section was enacted, and the wording of the subsection as a whole, the words “in which the institution has an interest” in sub clause 3 operate simply to restrict the categories of excluded records to those records relating to the institutions’ own workforce where the focus has shifted from “employment of a person” to “employment-related matters”. ...

MBS points out that one of the appeals that was before the Court in *Ontario (Solicitor General)* involved job competition records similar to those at issue in the present appeal.

MBS also submits:

On the basis of the Court of Appeal's decision and past ... orders, MBS respectfully submits that it has a significant interest, as employer, in the employment-related records at issue in this appeal. The recruitment process is fundamental to MBS's management of its workforce, since it is the means by which it constructs and determines the composition of that workforce. Consequently, MBS's interest, as an employer, in the employment-related matter at issue in these records goes well beyond mere "curiosity or concern".

Again, I concur the MBS's position, and find that it "has an interest" in the job recruitment process that generated the records at issue in this appeal, thereby satisfying the final requirement of section 65(6)3.

In his representations, the appellant takes issue with what he characterizes as the "broad exclusion in section 65(6)". In the appellant's view, this interpretation is inconsistent with what he states is the "privacy-based right of access inherent in section 49(c)" of the *Act*. In fact, section 49(c) does not create a right of access, but rather provides a discretionary exemption available to institutions when dealing with requests for access to personal information under Part III of the *Act*. However, in any event, section 49(c) only has potential relevance to records that fall within the scope of the *Act*. Because I have found that the records at issue in this appeal fall outside the *Act* under section 65(6)3, the appellant's arguments regarding section 49(c) are not relevant.

The appellant also points to possible confusion in the number of responsive records identified by MBS. In its original decision letter, MBS states that there are 14 responsive records, but only nine were listed in my Notice of Inquiry. Due to the nature of the appellant's request and my findings in this order, in my view, any additional responsive records not provided to this office by MBS during the course of this appeal would, by definition, also fall within the scope of section 65(6)3. Therefore, I find that no useful purpose would be served by requiring MBS to resolve this apparent inconsistency in the number of records.

In summary, I find that all of the records at issue in this appeal fall within the scope of section 65(6)3 and are therefore excluded from the scope of the *Act*.

ORDER:

I uphold MBS's decision.

Original Signed By: _____

Tom Mitchinson
Assistant Commissioner

February 4, 2003 _____